

# Exhibit F

COMMONWEALTH OF PENNSYLVANIA  
COUNTY OF LEHIGH  
BOARD OF ELECTIONS

IN RE: :  
: :  
BALLOT CHALLENGES OF :  
JARRETT COLEMAN and :  
ZACHARY COHEN CAMPAIGN :

TRANSCRIPT OF PROCEEDINGS

Public hearing in the above matter held in  
the offices of the Lehigh County Election Board in  
the Lehigh County Government Center, 17 North  
Seventh Street, Allentown, Pennsylvania, on Monday,  
November 15, 2021, commencing at 11 o'clock a.m.,  
stenographically recorded by James P. Gallagher III,  
Registered Diplomate Reporter.

BEFORE: LEHIGH COUNTY BOARD OF ELECTIONS  
  
DANIEL K. MCCARTHY, ESQ., Chairman  
DORIS A. GLAESSMAN  
JANE R. ERVIN  
  
JOSHUA S. MAZIN, ESQ., Solicitor  
TIMOTHY BENYO, Chief Clerk-  
Registration and Elections

\* \* \*

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1  
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15 -- For Zachary Cohen Campaign

16  
17 ALSO PRESENT:

18 ZACHARY COHEN

19 EDWARD WHITE  
20  
21  
22  
23  
24  
25

1                   MR. MCCARTHY: I would like to call to  
2                   order this meeting of the Lehigh County Board of  
3                   Elections. The three members that are present here  
4                   today, Doris Glaessman is to my right, Jane Ervin is  
5                   to my left, and I'm Dan McCarthy. And we're here  
6                   pursuant to, I believe, a request on the part of the  
7                   Election Division with respect to matters that have  
8                   to be attended to regarding the November 2 election.

9                   So having said that, I'll turn it over  
10                  to Mr. Benyo and Mr. Mazin to tell us the purpose of  
11                  the meeting and what's before us today.

12                 MR. MAZIN: So we're here this morning  
13                 for two matters, each of which involve challenges to  
14                 count or not count certain provisional ballots that  
15                 were cast in the November 2, 2021 election.

16                 We can start with the challenge filed  
17                 by Mr. Coleman. Is there anyone here for Mr.  
18                 Coleman?

19                 MR. DADAY: Yes.

20                 MR. MCCARTHY: Can you give us an idea  
21                 of the position involved here with this challenge?

22                 MR. MAZIN: So it's my understanding  
23                 that the position here, the nature of this challenge  
24                 is a challenge to count certain provisional ballots  
25                 that did not affix two signatures to those ballots,

1           and determination of whether that renders those  
2           ballots defective and invalid.

3                   MR. MCCARTHY: With respect to Mr.  
4           Coleman, what office is involved?

5                   MR. MAZIN: The office is he's a  
6           candidate for Parkland School Board.

7                   MR. MCCARTHY: Okay. All right. So I  
8           guess we'll take that first.

9                   MR. DADAY: Mr. Coleman couldn't be  
10          here today. He unfortunately has been detained down  
11          in Georgia. He was prepared to come on Friday, but  
12          he was -- he couldn't make it today. Mr. White is  
13          here. Mr. White was also present at the count of  
14          the provisional ballots, and I believe he fits the  
15          category of standing to contest the provisional  
16          ballots.

17                   MR. MCCARTHY: Mr. Daday, just for our  
18          record, would you give us your full name.

19                   MR. DADAY: Yes. Attorney Robert  
20          Daday on behalf of Mr. Edward White.

21                   MR. MCCARTHY: And Mr. Ed White is  
22          here present today.

23                   MR. WHITE: I am. Edward John White,  
24          1922 West Highland Street, Allentown. Allentown  
25          11-6 is my voting district. And I did vote in this

1 election, and was present during the entire  
2 pre-canvassing counting period.

3 MR. MCCARTHY: Very well. And you are  
4 here on behalf of Mr. Coleman?

5 MR. WHITE: I am.

6 MR. MCCARTHY: With respect to his  
7 objection and concern regarding the ballot count?

8 MR. WHITE: Yes, sir.

9 MR. MCCARTHY: Okay. So now we know  
10 who the players are with respect to the matter  
11 before us.

12 Would you state your concerns or  
13 objections, Mr. Daday.

14 MR. DADAY: Yes. I think the case law  
15 is very clear in this particular matter that the  
16 provisional ballot has to be signed by the voter in  
17 both places. There is case law, a case on it,  
18 Allegheny County Provisional Ballot, which is -- I  
19 don't have the -- oh, I do have it. Okay. It's an  
20 unpublished opinion, but it's 2020 Pennsylvania  
21 Commonwealth, unpublished, Lexis 566, also docketed  
22 at -- or not docketed, 241 A.3d 695.

23 Basically it's exactly the same  
24 situation that we have here. The Court ruled on it  
25 and said it's mandatory that both signatures be

1 placed on a provisional ballot, and in cases where  
2 it's only signed in one spot it's deemed to be a  
3 void ballot.

4 MS. ERWIN: How many ballots are we  
5 talking about?

6 MR. DADAY: I think there's 21.

7 MR. WHITE: 18.

8 MR. DADAY: Or 18 provisional ballots.

9 MS. ERVIN: Would that materially  
10 affect the election?

11 MR. BENYO: So the stance that we as  
12 your representative was to count these 18 ballots  
13 due to the fact that there was an issue with the  
14 poll book and the voters were forced to cast  
15 provisional ballots, and by no fault of their own,  
16 if it wasn't for the Election Board error, the voter  
17 would then not have to be put in that position to  
18 potentially make this error. And I believe there is  
19 case law that states that an error by the Election  
20 Board is not the fault of the voter. And,  
21 therefore, I would like to count those 18 ballots  
22 because the voter is not to be blamed for that  
23 defect.

24 MR. MCCARTHY: Were there more than 18  
25 provisional ballots cast in this election that were

1 signed?

2 MR. BENYO: There were. These are the  
3 18 that fall under the category of our error that  
4 only had one of the two required signatures for a  
5 provisional ballot.

6 MR. MCCARTHY: What I'm trying to  
7 determine is whether or not there were other people  
8 who voted provisionally as a result of an error from  
9 the office but who did sign the ballots in the  
10 required number of places?

11 MR. BENYO: There were.

12 MR. MCCARTHY: There were.

13 MR. BENYO: I do not have a number on  
14 that though.

15 MR. MCCARTHY: No, no.

16 MR. BENYO: But there were provisional  
17 ballots cast for the same reason who -- that had the  
18 voter sign in both places on the provisional ballots  
19 as required.

20 MR. MCCARTHY: Do you know, and if you  
21 don't know it's okay to say you don't know, why some  
22 were signed appropriately and others were not  
23 signed?

24 MR. BENYO: I don't know the  
25 circumstance for every one of the 18. But it was



1       either not explained to them by the people in charge  
2       of the poll workers at the polling places, or it was  
3       a mistake by the voter in the instructions, not  
4       understanding the instructions on the envelope.

5               MR. MCCARTHY:   How many precincts were  
6       involved with respect to this particular office?

7               MR. BENYO:    It's not specific to an  
8       office.   These are just ballots overall that were  
9       not counted.   These were throughout the county.

10              MR. MCCARTHY:   Okay.   And these 18  
11      happen to be relevant to this particular office or  
12      position?

13              MR. BENYO:    I don't think that's --  
14      that doesn't have to be a qualification of a  
15      challenge.

16              MR. MCCARTHY:   I'm just trying to  
17      determine what happened.   Okay.   So these 18 don't  
18      necessarily justify a printed ballot.

19              MR. BENYO:    Correct, yeah.   They're  
20      random, they're somewhat random, correct.

21              MR. MCCARTHY:   Okay.   I'm getting the  
22      hang of the facts here.

23              MS. ERVIN:    Yes.   There are 18  
24      provisional ballots not signed properly, but you  
25      want to count them because it wasn't the voter's

1 | fault that they had to cast them provisionally?

2 MR. BENYO: Correct.

3 MS. ERVIN: Okay.

4 MR. MCCARTHY: Right.

5 MS. ERVIN: Even though other voters  
6 who were forced to cast a provisional ballot signed  
7 in both places?

8 MR. BENYO: Signed correctly.

9 MS. ERVIN: Correct.

10 MR. MCCARTHY: All right. Mr. Daday,  
11 do you have a response to that factual explanation?

12 MR. DADAY: Well, the question is, I'm  
13 assuming, Mr. Benyo, that there were other  
14 provisional ballots that were cast that did not have  
15 both signatures, is that correct?

16 MR. BENYO: Correct.

17 MR. DADAY: And they were  
18 disqualified, is that correct?

19 MR. BENYO: They will be coming up in  
20 the second challenge category of this hearing, so  
21 yes.

22 MR. DADAY: Okay. But you decided  
23 that they were disqualified, is that not correct?

24 MR. BENYO: Yes.

25 MR. DADAY: So let me just get this

1 correct now. You said that there was a problem with  
2 the poll book, is that correct?

3 MR. BENYO: Correct.

4 MR. DADAY: And so what was wrong with  
5 it?

6 MR. BENYO: When a voter was looked up  
7 it showed that they had already cast their mail  
8 ballot, which in fact wasn't always the case. It  
9 should have said only in there that the ballot was  
10 sent to them. And choosing the most secure way to  
11 make sure that someone was not able to vote twice,  
12 we recommended that the voter, if they were in that  
13 situation, cast a provisional ballot.

14 MR. DADAY: So just in general, if  
15 there is some question as to whether somebody had  
16 voted or not would the provisional ballot be issued?

17 MR. BENYO: It would.

18 MR. DADAY: So did that happen in  
19 other cases throughout the county this year?

20 MR. BENYO: Yes.

21 MR. DADAY: Okay. And what happened  
22 with those provisional ballots?

23 MR. BENYO: After investigation,  
24 depending if they were filled out correctly, they  
25 were either counted or not counted.

1 MR. DADAY: And so if they were not  
2 filled out correctly they were not counted, is that  
3 correct?

4 MR. BENYO: Correct.

5 MR. DADAY: Okay. So the correct  
6 method for dealing with this issue, whether it's a  
7 mistake with the machine or something of that  
8 nature, where you couldn't figure out whether or not  
9 they voted, is to give the person a provisional  
10 ballot?

11 MR. BENYO: Correct.

12 MR. DADAY: And so if a person didn't  
13 fill out the provisional ballot correctly you  
14 wouldn't count that vote, is that correct?

15 MR. BENYO: In circumstances where  
16 there was an error by the voter, yes.

17 MR. DADAY: Okay.

18 MS. ERVIN: Tim, are you saying that  
19 only 18 voters across the county voted provisionally  
20 whose names were somehow mistakenly listed as having  
21 already voted?

22 MR. BENYO: There are 18 who did not  
23 properly fill out the envelope. There were many  
24 more that voted provisionally that did fill it out  
25 correctly and they were investigated and they were

1       legitimately supposed to be given a provisional  
2       ballot because of the circumstance.

3               MS. ERVIN:   So I'm not exactly sure  
4       why those 18 stand out. It sounds to me like what  
5       you're saying is there are some, some provisional  
6       ballots were filled out correctly. Great. Some  
7       provisional ballots that were filled out correctly  
8       were given because of some fault with the election  
9       book, and then some provisional ballots were given  
10      because of the fault with the election book and they  
11      weren't filled out properly?

12             MR. BENYO:   Correct.

13             MS. ERVIN:   And that's just 18.

14             MR. BENYO:   Correct.

15             MS. ERVIN:   The last category of 18.

16             MR. BENYO:   Yes.

17             MS. ERVIN:   Right. Okay.

18             MR. DADAY:   I have another couple  
19      questions.

20             MR. MCCARTHY:   Sure.

21             MR. DADAY:   So how many provisional  
22      ballots were issued with regard to the poll book  
23      problem?

24             MR. BENYO:   I don't know that number.

25             MR. DADAY:   You didn't keep track of

1           that?

2                       MR. BENYO:   No.

3                       MR. DADAY:   So you have no idea  
4           whether they were all counted I'm presuming?

5                       MR. BENYO:   They were all counted  
6           except for these.

7                       MR. MCCARTHY:  Do you have a number,  
8           to satisfy my curiosity, how many provisional  
9           ballots were submitted for everything?

10                      MR. BENYO:   776.

11                      MR. MCCARTHY:  Okay.

12                      MR. BONIN:   May I be heard on this  
13           issue?

14                      MR. MCCARTHY:  If you would identify  
15           yourself, sir.

16                      MR. BONIN:   My name is Adam Bonin, B O  
17           N I N.  I'm an attorney.  I'm here on behalf of Zach  
18           Cohen who is a candidate for the Court of Common  
19           Pleas.  I'm primarily here on an issue that's going  
20           to be heard a little bit later during this hearing,  
21           but just I want to make sure I understand this  
22           because obviously any issue in the count bears upon  
23           his race.

24                      Tim, am I remembering correctly that  
25           provisional ballots, unlike mail ballots, your

1 office is required to do signature matching to make  
2 sure that these are in fact the voters who requested  
3 them?

4 MR. BENYO: We do look at the  
5 signatures and compare it to the registration,  
6 correct.

7 MR. BONIN: Okay. And you did that  
8 for these?

9 MR. BENYO: Correct.

10 MR. BONIN: And there was no question  
11 as to any of these ballots as to whether one of the  
12 two signatures provided is authentically that of the  
13 voter?

14 MR. BENYO: There's no question.

15 MR. BONIN: So the only question is  
16 that they did not provide a second signature on a  
17 second place on the ballot?

18 MR. BENYO: That's correct.

19 MR. BONIN: Okay. I just want to make  
20 that clear.

21 MR. MCCARTHY: So there's at least one  
22 signature of the voter on every provisional ballot  
23 that's before us for consideration?

24 MR. BENYO: Yes, sir.

25 MR. MCCARTHY: Where did they sign and

1       where did they not sign?

2               MR. BENYO:   There's two places to  
3       sign.   The first is that they are -- that's a voter  
4       affidavit of the provisional ballot that they affirm  
5       that they are the person who it is, and then the  
6       second is the voter's signature, and that they're  
7       properly registered in the election district.   And  
8       they are both listed on there.   The one is given --  
9       one needs to be signed prior to receiving the  
10      ballot, the second is after the ballot is cast.

11             MR. MCCARTHY:   And is there any  
12      consistency as to what part was signed or what part  
13      was not signed, or is it random?

14             MR. BENYO:   It's random.   It's both,  
15      back and forth.

16             MR. MCCARTHY:   Okay.

17             MS. ERVIN:   On the one hand, obviously  
18      the people who came in to vote intended to vote,  
19      were legally allowed to vote, but, you know, they  
20      had an opportunity to vote and they took that  
21      opportunity, and through no fault of their own they  
22      signed a provisional ballot.   They had to vote by  
23      provisional ballot.   But at the end of the day they  
24      didn't put in a second signature.   So does that mean  
25      they should be thrown out because they forgot the



1 second signature or does it mean we should count  
2 their vote because their intentions were correct?

3 MR. MCCARTHY: I think that sums up  
4 the issue, yes. All right.

5 MR. DADAY: I have a couple more  
6 questions. In how many of these cases did they not  
7 sign the affidavit?

8 MS. ERVIN: Bob, what do you mean by  
9 the affidavit?

10 MR. DADAY: There's an affidavit  
11 portion that's required to be signed on the  
12 provisional ballot.

13 MS. ERVIN: Is that one of the two  
14 signatures we're talking about?

15 MR. DADAY: Yes.

16 MR. BENYO: 14 out of 18.

17 MR. DADAY: That do not have the  
18 affidavit signed, is that correct?

19 MR. BENYO: That is correct.

20 MR. MCCARTHY: And if you would, Mr.  
21 Benyo, give us the distinction between the affidavit  
22 signature and the other signature.

23 MR. BENYO: The affidavit signature  
24 says, I do solemnly swear or affirm that my name,  
25 date, and birth are as I have listed above, and at

1       the time of the register I resided at the address I  
2       provided above in the Commonwealth of Pennsylvania,  
3       and that this is the only ballot I have cast in this  
4       election.

5               And then the signature after they  
6       voted, I declare under penalty of law that I am  
7       properly registered to vote in the election district  
8       indicated in my affidavit, and that I am eligible  
9       to vote in this election and this election district.

10              MR. MCCARTHY: Okay. So the first  
11       affidavit that gives information as to their name,  
12       their address, and sign an affidavit that that's  
13       accurate.

14              Who fills in that name and address?

15              MR. DADAY: The voter.

16              MR. MCCARTHY: The voter does that.

17              MR. MAZIN: I guess I have a question  
18       for Mr. Daday, based upon the case law he cited.  
19       Given the fact pattern that Mr. Benyo described, is  
20       that the same fact pattern that's in the case you  
21       recited?

22              MR. DADAY: In these cases, in the  
23       case that's cited -- I can give you a copy of the  
24       case. It's the -- it says that the signature has to  
25       be signed, it's a mandatory provision, and therefore

1 the ballots have to be discounted.

2 MR. MAZIN: But is there anything in  
3 there that speaks to the issue that Mr. Benyo  
4 described in terms of it perhaps falling on the  
5 part -- the error being on the part of the county,  
6 and, therefore, causing the person to have to vote  
7 provisionally?

8 MR. DADAY: Well, that would be --  
9 essentially would be considered to be a breakdown in  
10 the process. And I don't see that to have happened  
11 here. He testified to the fact that when the  
12 matter, when the person came in to vote it popped up  
13 saying that they already had voted. They did the  
14 correct thing, and they gave them a provisional  
15 ballot. That is the process that's supposed to  
16 happen when there is any type of issues with regards  
17 to either the failed computer, or the computer is  
18 out at the voting place.

19 MR. MAZIN: But does the case that you  
20 cited address --

21 MR. DADAY: Not that. Not that, no.  
22 Not specifically, no.

23 MR. MAZIN: Okay.

24 MR. MCCARTHY: Would you like to  
25 provide a copy of that case?

1 MR. DADAY: Sure.

2 Now, this is the case the Supreme  
3 Court decided.

4 MR. MAZIN: Thank you.

5 MR. DADAY: I mean, I don't know if  
6 you've got this one.

7 This is the other one too. This is  
8 the Howells case. In that case they did -- what  
9 happened, and it's actually our county, in that case  
10 what happened is completely different from the  
11 current case. In that case Terry had given  
12 basically some bad information to some of the  
13 candidates, and they relied on it to their  
14 detriment, and then the issue came back up and  
15 somebody contested it. But that's clearly different  
16 than this particular case where there wasn't a  
17 breakdown in the process.

18 MR. MAZIN: So what would constitute a  
19 breakdown in the process then?

20 MR. DADAY: Well, I think certainly  
21 the case that was decided here in Lehigh County  
22 where Terry had given basically bad information,  
23 incorrect information to the candidate, which caused  
24 them to fill out the forms incorrectly, or did not  
25 have the -- I think it was the financial affidavit

1 had to be signed or filled in from the AOPC. These  
2 candidates were all told they didn't have to do  
3 that, which is completely different from this case,  
4 because as I said, okay, maybe the machine was  
5 defective, or maybe there was an issue with the  
6 machine, but the correct thing happened. They were  
7 given a provisional ballot. They filled it out.  
8 They filled it out incorrectly.

9 MR. BONIN: Tim, I understand what  
10 you're saying is we don't know what the judges of  
11 election instructed each individual voter as to how  
12 they had to sign and where to sign, that's not an  
13 issue here?

14 MR. BENYO: Correct.

15 MS. ERVIN: The question I have about  
16 that is you said 14 out of 18 signed the affidavit?

17 MR. DADAY: Did not sign the  
18 affidavit.

19 MS. ERVIN: Did not sign the  
20 affidavit.

21 MR. BENYO: But they did sign the  
22 voter signature.

23 MS. ERVIN: Okay. So when they were  
24 given the provisional ballot should the person who  
25 gave it to them from the election office have said

1       you have to fill this out before I can give you this  
2       ballot?

3                   MR. BENYO:   That would be the proper  
4       procedure, yes.

5                   MR. DADAY:   Can you say that again?  
6       I'm not sure I heard that.

7                   MR. BENYO:   That would be the  
8       procedure, yes.   You fill in that in the affidavit,  
9       then you get the ballot.   Then you sign it.

10                  MR. DADAY:   Right.   But the Judge of  
11       Elections wouldn't be providing instructions?

12                  MR. BENYO:   They should not be  
13       providing instructions.

14                  MS. ERVIN:   But they would have to see  
15       that the voter filled out the thing before the  
16       affidavit, before they give them the ballot, is that  
17       true?

18                  MR. BENYO:   No.

19                  MR. DADAY:   No, because the signature  
20       on the provisional ballot is the first one that  
21       they're actually given the provisional ballot.   The  
22       affidavit is after they filled it out, is that  
23       correct?

24                  MR. BENYO:   They get the envelope  
25       first.   Then they get the -- they fill out the first

1 part, and then they're given the ballot, and then  
2 they stuff it in the envelope and then sign.

3 MR. DADAY: Sign the affidavit.

4 MR. BENYO: Sign the signature.

5 MR. MCCARTHY: But when they get the  
6 initial piece of paper, the provisional ballot,  
7 they, the voter fills in their name.

8 MR. BENYO: Correct.

9 MR. MCCARTHY: And their address?

10 MR. BENYO: Yes.

11 MR. MCCARTHY: All that information.

12 MR. BENYO: Yes. That's the process.

13 MR. MCCARTHY: But 14 of those people  
14 who got that neglected to sign the affidavit -- the  
15 statement saying this is the accurate address for me  
16 and --

17 MR. BENYO: That's correct.

18 MR. MCCARTHY: Okay.

19 MR. MAZIN: I mean, I would say I'm  
20 looking at the case that Mr. Daday provided. The  
21 Court does read the language that both signatures  
22 are required as mandatory. And because it's termed  
23 that way in the statutory provision, shall include  
24 both signatures, and there's a separate provision  
25 that says, failure to affix both signatures renders

1 the ballot invalid, that's what the reasoning is  
2 here. I note also within here the Court made a  
3 statement that even though there was no evidence of  
4 anything that was misleading to voters, even if  
5 there had been the bright-line rule in the statute  
6 would trump that. And that's based upon the  
7 Commonwealth Court's interpretation of Supreme Court  
8 case law.

9 There is a dissenting opinion in this  
10 case, so it was a split decision, a split  
11 Commonwealth Court panel, where one judge argued  
12 that the defect was -- and the lack of a second  
13 signature could be overlooked as more of a technical  
14 defect. But that was not the holding of the  
15 majority.

16 MR. MCCARTHY: So there was a  
17 Commonwealth Court decision, not appealed to the  
18 Supreme Court?

19 MR. MAZIN: It looks like there was a  
20 petition for allowance of appeal filed, and it was  
21 denied.

22 MR. MCCARTHY: Okay. Anything else  
23 from anybody with respect to this matter?

24 Sir, could you tell us your full name?

25 MR. COWEN: Absolutely. My name is



1 Corey Cowen. C O R E Y, C O W E N. I believe I'm  
2 one of your 18 voters.

3 MR. MCCARTHY: Could you stand up,  
4 sir, and you can take off your mask if you want to.

5 MR. COWEN: I believe I'm one of your  
6 18 voters. And there are two challenges today. I  
7 don't know if I'm involved in the second challenge  
8 or not. So you're asking questions about what the  
9 instructions with things were today, and that  
10 process, because I was there. I'd be more than  
11 happy to offer what I did.

12 MR. MCCARTHY: Go ahead.

13 MR. COWEN: I went to vote. I  
14 originally asked for a mail-in ballot for my wife  
15 and I during COVID. I got the opportunity to go  
16 down and vote and were told about the provisional  
17 process.

18 MR. MCCARTHY: Could you tell us where  
19 you voted at, sir?

20 MR. COWEN: Yes. Fearless Fire  
21 Company. And we went there and were told it wasn't  
22 the normal process but it was provisional. And I  
23 believe both my wife and I made the same error, even  
24 though at the same time. My wife will tell you she  
25 doesn't make mistakes, but I do. But we did both at

1 the same time. And I guess the question I have, I  
2 also had done the electronic signature on the iPad  
3 as well. So if you believe weather my vote makes a  
4 difference or not, that was the process. I was  
5 verified by the normal process. But that would be  
6 then error on my part, because not knowing -- I've  
7 never voted that way before.

8 MR. MCCARTHY: Right.

9 MR. COWEN: I was trying to think back  
10 when I got the call about the challenge to see if,  
11 you know, run through it, and I know I signed a  
12 couple of times. I wasn't aware, again, of any  
13 instruction that I missed. But I do realize that  
14 that's a relatively minor process of all the votes  
15 when you do something infrequently. Neither my wife  
16 or I remembered any specific instructions that we  
17 were given. It wasn't busy, we weren't rushed. It  
18 wasn't hectic or anything like that.

19 MR. MCCARTHY: Do you recall signing  
20 twice or one time? Or not at all, you don't recall  
21 that?

22 MR. COWEN: I remember filling out my  
23 address and the other pieces. But that's sort of --  
24 when you do that, that's just sort of by rote. I  
25 know I signed electronically in the iPad which I

1 normally do when I vote. But specifically the  
2 second time, if I got the call I assume I missed  
3 one.

4 MR. MCCARTHY: Okay.

5 MS. ERVIN: One quick question. Has  
6 this happened before?

7 MR. BENYO: This particular situation,  
8 no, it's not happened before. And I mean, my  
9 preference is that I err on the side of the voter,  
10 if possible. I tend to vote, or to err on the side  
11 of the voter and give the voter intent to have that  
12 come out in a proceeding like this, not -- not to  
13 make a decision for the voter. And let that -- let  
14 the process happen. So however that works out.  
15 That's how I proceed in making a judgment.

16 MR. MCCARTHY: Okay.

17 MS. ERVIN: Well, since we are  
18 wrapping things up, I tend to lean toward the  
19 voter's intent as well. And I feel like, yes, it's  
20 a technical issue, and was incorrect. However,  
21 there was a mistake by the -- by the election  
22 office. So I think you have to take that into  
23 account. So my -- I would lean toward the intent of  
24 the voter in this particular case.

25 MR. MCCARTHY: Okay.

1                   Ms. Glaessman, what do you think about  
2                   this?

3                   MS. GLAESSMAN: Well, I think because  
4                   of the fact that there appears to be some  
5                   misinformation given, or no information in certain  
6                   cases, if there's one signature there that could be  
7                   matched to the electronic poll book, I think they  
8                   should, you know, agree to that, use the other  
9                   signature. There's nothing in that case law that  
10                  specifically disallows a provisional ballot if  
11                  there's only one signature, is there?

12                  MR. MAZIN: That's what it says. It  
13                  says based upon the statute. The statute is  
14                  mandatory, is worded, shall affix two signatures,  
15                  and the failure to affix both signatures is more  
16                  than just a technical defect.

17                  MS. GLAESSMAN: Oh, that is in the  
18                  case law?

19                  MR. MAZIN: That's in the case law,  
20                  that it shall.

21                  MS. GLAESSMAN: And that case law  
22                  stood? It wasn't appealed?

23                  MR. MAZIN: It's still good law. An  
24                  attempt to appeal was made. The Supreme Court  
25                  denied the appeal. So the Supreme Court didn't

1 review it. They declined to review it.

2 MS. GLAESSMAN: So that stands then.

3 MR. MAZIN: That stands.

4 MS. GLAESSMAN: So that maybe changes  
5 our way of thinking because there's case law there  
6 now.

7 MR. MCCARTHY: That case law --  
8 correct me if I'm wrong, was a situation where you  
9 had a standard situation with a mail-in ballot  
10 coming in being processed with many others. This  
11 case though involved provisional ballots in a  
12 situation where there was some involvement, or  
13 non-involvement on the part of the Election Board.  
14 Is that a distinction or is it a distinction without  
15 a difference?

16 MR. MAZIN: I mean, my read of it is  
17 it's a distinction without a difference. It did  
18 concern specifically provisional ballots and the  
19 statutory provision that covers those. And the  
20 Court went on to say if first there was nothing in  
21 the record to support an assertion that misleading  
22 information was given in this case, but had there  
23 been it wouldn't change the result because the  
24 statutory, the mandatory nature of the statutory  
25 language would override that.

1 MR. MCCARTHY: Okay.

2 MS. GLAESSMAN: That clears up my  
3 thinking now.

4 MR. MCCARTHY: Okay.

5 MS. GLAESSMAN: I think we're going to  
6 be bound by that case law.

7 MR. MCCARTHY: Okay.

8 MS. ERVIN: If we did -- if we did  
9 allow the votes to count, would there be -- would  
10 we get in trouble?

11 MR. MAZIN: No. It's your decision.  
12 There's no trouble.

13 MS. ERVIN: From, you know, at the  
14 next level, the Commonwealth Court scenario.

15 MR. MAZIN: Right, reviewing it. No,  
16 I mean -- you know, I think certainly the argument  
17 could be made that you could distinguish any case.  
18 So the fact here that you did have the error in the  
19 poll book, which wasn't exactly the scenario here,  
20 you know, there's a colorable argument to say that  
21 was a distinction, because this case addressed  
22 potentially misleading information at the poll, not  
23 specifically the situation where the person went to  
24 vote and it was determined that they had already  
25 cast a vote. And then, therefore, they wouldn't

1        have had to vote provisionally but for the county's  
2        mistake, or the mistake from the poll book. So I  
3        think you can -- you can argue that there's a  
4        distinction there. I think the Court, the  
5        overarching thing from the case is that the language  
6        of the statute on the two signatures is mandatory.  
7        So based upon this, it doesn't look like that would  
8        change the outcome. But there's a distinction  
9        certainly to be argued.

10                MS. GLAESSMAN: You're talking  
11        about -- you're talking about a distinction between  
12        a provisional ballot in place of a mail-in ballot or  
13        actual --

14                MR. MAZIN: No, I was talking about a  
15        distinction between perhaps misleading information  
16        being given at the poll, which resulted in the  
17        problem, versus a situation where the person  
18        wouldn't have even had to vote provisionally had the  
19        poll book not been in error. So that's probably a  
20        distinction without a difference, but there is that  
21        factual breakdown to it.

22                MS. GLAESSMAN: Okay.

23                MR. MCCARTHY: Okay. Anything from  
24        anyone before we vote on this matter?

25                MR. DADAY: Again, I think the case

1 law speaks for itself. The language of the Code  
2 is mandatory. It says shall. It really -- you  
3 can't -- what's going to happen in the next case if  
4 you take this distinction? Just because the county  
5 has some error or something doesn't mean that the  
6 process broke down. The process actually worked  
7 correctly. They gave them a provisional ballot, and  
8 unfortunately they didn't sign in both places.  
9 Therefore, I don't think you have any choice but to  
10 discount these votes.

11 MR. MCCARTHY: Shall we vote?

12 Okay. The matter before us is whether  
13 or not to approve the count of these 18 challenged  
14 ballots. I'll entertain a motion from any of my  
15 co-members to rule on that, to be for having these  
16 ballots counted, or not having these ballots  
17 counted.

18 MS. ERVIN: I move that we take a  
19 vote.

20 MR. MCCARTHY: You move we take a  
21 vote. All right.

22 If no one makes a motion I'll make the  
23 motion.

24 MS. GLAESSMAN: Your motion is?

25 MR. MCCARTHY: My motion would be to



1 not count these 18 challenged ballots for the reason  
2 that although there may have been some failure to  
3 strictly follow procedures even requiring people to  
4 vote to have to go to a provisional ballot, that  
5 nevertheless there is an obligation to comply with  
6 the statute and the case law as given to us by our  
7 solicitor with respect to how we view these  
8 challenged ballots, and our advice from the  
9 solicitor is that there's a very strong requirement  
10 that there be two signatures on the provisional  
11 ballot. And absent some tremendous breakdown in the  
12 ability to comply with the statute, through the  
13 fault of the Election Board, which I don't see,  
14 these ballots should not be counted.

15 So my motion is to not count the  
16 ballots.

17 MS. GLAESSMAN: I'll second it.

18 MR. MCCARTHY: Okay. It's been moved  
19 and seconded. Is there any discussion on the  
20 motion?

21 Hearing none, all those in favor of  
22 the motion signify by saying aye.

23 MS. GLAESSMAN: Aye.

24 MR. MCCARTHY: Aye.

25 All those opposed signify by saying

1 no.

2 MS. ERVIN: No.

3 MR. MCCARTHY: Okay. By a vote of two  
4 to one these ballots are not to be counted.

5 MS. ERVIN: My point is to be on the  
6 side of the voter.

7 MR. MCCARTHY: Understood. And my  
8 sympathies rest with the voters too.

9 Okay. All right. So that's matter  
10 number one. Is there another matter to come before  
11 this Board?

12 MR. MAZIN: Yes. I believe there is a  
13 second matter. The second matter also involves a  
14 situation where there was a failure to affix two  
15 signatures, but I think the fact pattern, my  
16 understanding is the fact pattern is quite different  
17 from the fact pattern of the matter we just heard.  
18 So there is a challenge to a determination that was  
19 made in this instance not to count the ballots, and  
20 I think the challenge is in the nature by Mr.  
21 Cohen's campaign is that the ballots should be  
22 counted.

23 MR. MCCARTHY: All right. And how  
24 many ballots are we discussing today?

25 MR. MAZIN: I believe it's three

1       ballots that are at issue.

2               MR. MCCARTHY: Three ballots. All  
3       right. So the matter is being challenged. Would  
4       you care to tell us the nature of your challenge?

5               Let's get some information from Mr.  
6       Benyo.

7               MR. BENYO: These three ballots are  
8       similar, that these three ballots are similar in  
9       that they do not have both signatures from the  
10      affidavit and for the voter signature. But they do  
11      not fall into the category of our error, or our  
12      problem with the poll book. They for whatever  
13      reason, they are not registered, or whatever the  
14      reasoning is, they are not registered, and that's  
15      why they had to vote on a provisional ballot.

16              MR. MCCARTHY: They're not in this  
17      district that --

18              MR. BENYO: It was determined by the  
19      computation board that they were to vote -- I mean,  
20      these were legitimate ballots for whatever reason to  
21      be voted provisionally.

22              MR. BONIN: We can expedite things.  
23      Given the Board's ruling on the first appeal, we're  
24      prepared to just withdraw our questions as to these  
25      three ballots. And we prefer to proceed on to the

1 other category of the ballots.

2 MR. MCCARTHY: All right. So these  
3 matters are withdrawn, the challenge to these  
4 matters are withdrawn. Thank you.

5 MR. BENYO: I did -- I did provide  
6 the Board with information on a meeting with Mr.  
7 Cohen's representation on looking at mail ballots  
8 that we did not count due to different categories.  
9 And I did say that this may come up.

10 MR. BONIN: With the Board's  
11 permission I would like to remove my mask.

12 MR. MCCARTHY: Sure.

13 MR. BONIN: Thank you. Well, I  
14 actually have written some of my remarks which I'm  
15 happy to hand out to the three Board members. I  
16 prepared one for the solicitor as well.

17 MR. MAZIN: I don't get a vote.

18 MR. BONIN: You don't get a vote, but  
19 I think you're going to know the main case that  
20 we're going to be talking about today. And I'm  
21 going to try to expedite things given what the Board  
22 has already said. But the question here is with  
23 regard to the mail ballots submitted by voters where  
24 the voters signed the outside of the mail ballots  
25 but did not date the outside of the mail ballot, and

1       for which Mr. Benyo confirmed all these were  
2       otherwise duly properly registered voters. All of  
3       these ballots were received before 8 p.m. on  
4       election day. So the timeliness is not the issue.

5               And here, you know, the statute is  
6       clear, the statute does say with regards to the  
7       outer envelopes that the elector shall then fill  
8       out, date and sign the declaration printed on such  
9       envelope. So we go again to the question of what  
10      does shall mean.

11             This issue came up extensively during  
12      last year's post election litigation. It was  
13      raised --

14             MR. MAZIN: Can I ask you to pause  
15      for a second. Is there a provision in the Election  
16      Code -- I understand the provision regarding  
17      provisional ballots, challenges to provisional  
18      ballots. Is there a provision in the Election Code  
19      that allows the Board to consider this type of  
20      challenge at this stage?

21             MR. BONIN: I can't think of any  
22      reason why not. You know, prior to certification  
23      the Board can, you know, consider or reconsider any  
24      category of ballots as to whether they're part of  
25      the count. And, you know, and in fact there is also

1 a process through which the Board decision can be  
2 appealed under 25 P.S. 3157 to the Court, to the  
3 Court of Common Pleas regarding sort of discrete  
4 issues of law prior to certification. The whole  
5 point being if you can avoid an overall recount and  
6 just resolve the one issue you just resolve the one  
7 issue, and then everything else can move forward.

8 MR. MAZIN: Is there authority for  
9 that though, is there a statutory provision? I just  
10 haven't seen that arise quite this way before.

11 MR. BONIN: I'm happy to go back and  
12 look at the Election Code and think about what the  
13 clearest place is. But this is -- this is part of  
14 the Board sitting as a computation board prior to  
15 certification, as far as I'm concerned.

16 MR. MAZIN: All right.

17 MR. BONIN: So because in particular  
18 an incredibly tight state Senate race out west this  
19 issue made it up to the State Supreme Court in the  
20 matter of In Re: Canvass Of Absentee And Mail-In  
21 Ballots Of November 3, 241 A.3d 1058.

22 It was decided late November last  
23 year, and it was a 3-1-3 decision of the State  
24 Supreme Court. And that one obviously is crucial  
25 here because the three justices announcing the

1 judgment of the Court, Justice Donohue, Justice Todd  
2 and Justice Baer said that this is a minor error,  
3 you see it in the power of the throne about the  
4 minor irregularities should only be compelled for  
5 compelling reasons -- used for compelling reasons,  
6 this is not a compelling reason.

7 You had three justices in dissent,  
8 Justice Dougherty, Justice Saylor and Justice Mundy  
9 who said, as we were talking about with the  
10 provisional ballots, shall means shall, we don't  
11 care if it's a smart shall or a stupid shall, the  
12 General Assembly spoke, we must listen.

13 Justice Wecht in the middle has the  
14 deciding opinion in the case. It was a concurrence  
15 of the dissent. In his opinion he said that, look,  
16 shall means shall, and the date requirement should  
17 be deemed mandatory, and we as a court get into  
18 trouble when we try to decide which shall the  
19 General Assembly was serious about in the Election  
20 Code and which they weren't.

21 But then he qualified that opinion,  
22 and this is what I really quote at length here, and  
23 I want the Board to focus on. Because he noted that  
24 part of what was happening in 2020 were severe  
25 ramping problems after Act 77's passage, and with

1 the historic desire for mail-in balloting given the  
2 COVID pandemic.

3 And so what he said was that in this  
4 case voters did not have sufficient warning that  
5 shall would mean shall, and that these votes this  
6 time should be counted. What he said was that, you  
7 know, disqualification is appropriate so long as the  
8 Secretary and the county boards of election provide  
9 electors with adequate warnings for completing the  
10 declaration of the elector, including conspicuous  
11 warnings regarding the consequences for failure to  
12 adhere to the requirements. And he went on to say,  
13 I cannot say with any confidence that even diligent  
14 electors were adequately informed as to what was  
15 required to avoid the consequence of  
16 disqualification in this case.

17 Going forward he then said, you know,  
18 that it's a silver lining that many of these  
19 problems came up this year, and are now clear  
20 enough, he says, that the legislature and the  
21 Department of State have notice of what statutory  
22 refinements are most needful. And he stated that it  
23 is his sincere hope that the General Assembly sees  
24 fit to refine and clarify the Election Code  
25 scrupulously in light of the lived experience, and



1       that because this was the second time that this  
2       declaration requirement had come before the Court,  
3       that it was time for the General Assembly to clarify  
4       and perhaps streamline the form and the function of  
5       the declaration to prescribe its form to give unity  
6       and clarity across the Commonwealth.

7               That hasn't happened. The General  
8       Assembly has obviously talked about a great many  
9       things in the year after last year's election. They  
10      haven't enacted any legislation changing the mail-in  
11      process as well.

12             And the real problem here, you know, I  
13      say this with all due respect to Mr. Benyo, who I  
14      know works incredibly hard at this, and to the  
15      Board, is that I don't believe that the ballots  
16      issued by Lehigh County this year provided that  
17      level of clarity.

18             You'll see in your packet I gave two  
19      comparisons with what the Lehigh County outer  
20      envelope looks like compared to Philadelphia, which  
21      I happen to have because this is my own ballot, and  
22      I put it on social media all the time, I post a  
23      picture of it.

24             And in terms of the font size being  
25      used, the bold that's being used, the use of all

1 caps, and the underlining of, your ballot will not  
2 be counted, as opposed to the passive voice on the  
3 flap, your ballot must have the following to be  
4 counted.

5 And in particular, you know, and lord  
6 knows we have problems with election administration  
7 in Philadelphia, and there are things we can be  
8 doing better, you know, having giant arrows for the  
9 voters pointing to the signature block and the date  
10 block has really drawn their attention to that, as  
11 opposed to the requirement on the Lehigh County  
12 mail-in ballot.

13 I think it's a sufficient distinction  
14 to say that these envelopes this year in this county  
15 did not meet this threshold. That for 257 voters to  
16 make this mistake when so many mistakes were  
17 reduced, and, you know, Mr. Benyo, we talked about  
18 other categories of errors, we're not raising  
19 questions as to any of other categories here. It is  
20 only this category where you had this level of voter  
21 error on the outer envelope. You know, everything  
22 else dropped from 2020.

23 So as with, you know, the provisional  
24 ballots you were discussing before, there is no  
25 question that these were all lawful voters. There

1 is no question that their ballots were submitted on  
2 time. The question is whether this fits within the  
3 exception that Justice Wecht drew, and which  
4 controls the Supreme Court's handling of this case.  
5 Did voters at this time have sufficient warning on  
6 the outer envelope? And I printed the instructions  
7 which are on the county's website with regard to  
8 absentee availability, and which solely focused on  
9 the application process and not on reminders on how  
10 to vote properly.

11 I respectfully submit that these 257  
12 voters who did everything right, other than this  
13 technical requirement, but whose ballots were in  
14 fact timely submitted, that the Board should revisit  
15 this decision and vote to approve these envelopes.

16 MR. MCCARTHY: So is the matter before  
17 us the only deviance from the statute is they did  
18 not have a date?

19 MR. BONIN: That's the only thing that  
20 these voters --

21 MR. MCCARTHY: They had a signature,  
22 they had the mail-in.

23 MR. BONIN: Yes.

24 MR. MCCARTHY: They probably had a  
25 postmark on the letter. They got here before 8 p.m.

1 on November 2.

2 MR. BONIN: That's correct. That's  
3 right.

4 MR. MCCARTHY: But they didn't have a  
5 date.

6 MR. COHEN: May I just add -- Zachary  
7 Cohen on behalf of Zachary Cohen, that in addition  
8 to these 257 I believe there are three where they're  
9 dated on the other side of the envelope, but not on  
10 the date line. I want to also call that to the  
11 attention of the Board.

12 MR. MCCARTHY: They're dated where?

13 MR. COHEN: They're dated on the  
14 right-hand side of the envelope, as opposed to the  
15 date line.

16 MR. MCCARTHY: All right. So they  
17 have a date, but not exactly on --

18 MR. COHEN: But not on the line that  
19 says, date. That's separate from those 257 which  
20 are without a date, but otherwise compliant.

21 MR. MCCARTHY: These are not  
22 provisional ballots?

23 MR. BONIN: No. These are mail-in  
24 ballots properly and timely applied for by  
25 registered voters within the County, otherwise they

1 would not have received these.

2 MS. GLAESSMAN: So, in other words,  
3 what you're saying is they were signed here --

4 MR. BONIN: Yes, but not dated next to  
5 it.

6 MS. GLAESSMAN: But there was no date  
7 right next to it?

8 MR. BONIN: That's correct.

9 MS. GLAESSMAN: Except for those three  
10 who may have signed the date line over here?  
11 (Indicating)

12 MR. COHEN: Correct.

13 MR. BONIN: And I can certainly say  
14 from experience, and I don't know, Mr. Benyo, if  
15 this is your experience as well, voters often don't  
16 understand what that right side of the envelope is  
17 for because it's only for voters who needed  
18 assistance in filling out their mail-in ballots.

19 MR. MCCARTHY: So the matter before  
20 us, what you would like us to do is to authorize  
21 these 257 --

22 MR. BONIN: 257.

23 MR. MCCARTHY: 257, to be counted.

24 MR. BONIN: That's correct.

25 MS. GLAESSMAN: And these 257 either

1       have no date or the three have it on this right-hand  
2       side?

3               MR. BONIN: Yeah. There are 257 which  
4       are undated, and there are an additional three which  
5       have a date provided in a place other than the line,  
6       but otherwise on that side.

7               MS. GLAESSMAN: And they used the date  
8       line for the section for voter help?

9               MR. BONIN: Yes.

10              MS. GLAESSMAN: Okay.

11              MR. MCCARTHY: And on mail-in ballots,  
12       there's only one date required, is that true?

13              MR. BONIN: Yeah, there's only one  
14       place where the voters are required to provide it,  
15       yes.

16              MR. DADAY: Mr. McCarthy, we obviously  
17       contest the fact that they're bringing this  
18       challenge at this point in time. I think the  
19       statute is pretty clear, that the challenge has to  
20       be made before 5 o'clock on the date, the Friday  
21       after the election. If it's not brought before that  
22       then it can't be counted, or the challenge is  
23       ineffective. And this was -- this is from the  
24       Boockvar case that was decided by the Pennsylvania  
25       Supreme Court. As the Secretary has argued -- and

1       this is a footnote, as the Secretary has argued, the  
2       plain text of these provisions requires challenges  
3       to applications for mail-in ballot applications be  
4       brought no later than 5 p.m. on the Friday before  
5       the election.

6               MR. BONIN: These aren't challenges to  
7       the applications.

8               MR. MCCARTHY: Right.

9               MS. ERVIN: This is challenges to the  
10       mail-in ballots that were submitted for vote.

11              MR. BONIN: Yes, that's absolutely  
12       correct. That's challenges as to whether someone  
13       could properly apply for a mail-in ballot. There is  
14       that pre-election deadline.

15              MS. ERVIN: Pre-election deadline.

16              MR. BONIN: You obviously couldn't  
17       have a deadline before the election for challenging  
18       mail-in ballots and have three days to arrive.

19              MS. ERVIN: Tim, what is your intent  
20       here?

21              MR. BENYO: So different than the  
22       canvassing, the mail ballots are a separate section.  
23       Those are more like voting ballots on election day  
24       where that provisional process would be afterwards  
25       starting on Friday at 9 a.m. Then we interpret

1        whatever the findings are of those provisional  
2        ballots. So the mail ballots, they are -- as they  
3        come in they are checked, put in the system. These  
4        ballots were then determined that they did not meet  
5        the requirements of the date, or whatever, and then  
6        they are pre-canvassed on election day. So they're  
7        not counted on election day because they never make  
8        it into the voting process. And the canvassing and  
9        the computation board on Friday, which is a whole  
10       different animal than the process to review the  
11       mail-in. So those without signatures, without  
12       dates, they're determined prior to the canvassing.

13                   Does that answer your question?

14                   MS. ERVIN: Sort of.

15                   MS. GLAESSMAN: So, in other words,  
16       what you're saying, Tim, as of 7 o'clock in the  
17       morning of election day you can start taking the  
18       mail-in ballots and sorting out those that are  
19       complete with the signature and date on the outside  
20       envelope from those that are missing like the date?

21                   MR. BENYO: Right. And I guess  
22       technically at 7 a.m. those two categories are  
23       ready.

24                   MS. GLAESSMAN: You can start looking  
25       through them to separate out those that are missing



1 something?

2 MR. BENYO: Yes. These did not meet  
3 the requirements as determined by the Election Code  
4 to be included.

5 MS. GLAESSMAN: So that when Friday  
6 comes around the computation board can take those  
7 that are absolutely correct?

8 MR. BENYO: No. It's a separate  
9 process. The computation board has nothing to do  
10 with it.

11 MS. GLAESSMAN: They're treated  
12 separately, but they can work on the ballots that  
13 are correct that came in?

14 MR. BENYO: No. Friday, Friday at 9  
15 a.m. is a whole different animal. These are  
16 election day ballots more than they are provisional  
17 ballots.

18 MS. GLAESSMAN: Okay. All right. But  
19 you still can start on election day separating out  
20 those that don't comply with the signature and date  
21 on the envelope?

22 MR. BENYO: Well, we can either count  
23 or not count them at 7 a.m., depending on if they  
24 meet the requirements.

25 MS. GLAESSMAN: But basically you can

1 start going through them and separate those --

2 MR. BENYO: No, they're already  
3 separated if they meet the requirements. We can't  
4 open them and count them until 7 a.m.

5 MS. GLAESSMAN: But you can separate  
6 them before?

7 MR. BENYO: We can process them and  
8 make sure they meet the requirements.

9 MS. GLAESSMAN: Okay. You can  
10 separate the ones that don't comply completely with  
11 signature and date on the envelope?

12 MR. BENYO: Correct.

13 MS. GLAESSMAN: Okay.

14 MR. BENYO: And voters were given the  
15 opportunity to correct any errors on the outside of  
16 the ballot.

17 MS. ERVIN: You contacted all the  
18 people who --

19 MR. BENYO: We did not contact them.  
20 We canceled their ballot so that they would be  
21 notified through the Sure System that their ballot  
22 wasn't counted, would not be.

23 MR. MCCARTHY: Okay. Mr. Daday.

24 MR. DADAY: I guess I'm kind of  
25 confused. So these were completely discounted when

1       you got them. And the reason why you discounted  
2       these is what?

3               MR. BENYO: Well, what we're focusing  
4       on is the date, that it does not meet the  
5       requirements.

6               MR. DADAY: The date. The date was  
7       missing. And is that a requirement, it is required  
8       on the ballot?

9               MR. BENYO: It is required.

10              MR. DADAY: Okay.

11              MR. MCCARTHY: You used the word  
12       discounted. They were not counted. They were put  
13       off to the side.

14              MR. BENYO: They were separated, yes.

15              MR. MCCARTHY: They were received, but  
16       not counted.

17              MR. BENYO: Correct.

18              MR. MCCARTHY: Okay.

19              MR. BENYO: They are still not  
20       counted.

21              MR. MCCARTHY: Still not counted.

22              MR. BENYO: They're separated.

23              MR. MAZIN: Just so I understand,  
24       these were ballots that because of the defect that  
25       they didn't even make it to the counting process?

1 MR. BENYO: Correct. Pre-canvassing,  
2 they did not make it to pre-canvassing.

3 MR. DADAY: And it was your opinion  
4 based on your review of all these ballots that they  
5 weren't effective, is that correct?

6 MR. BENYO: That's correct. They did  
7 not meet the requirements because the date was not  
8 present.

9 MR. DADAY: Which is a requirement.

10 MR. BENYO: Which in my understanding,  
11 and with consulting with the Law Department.

12 MR. DADAY: Now, in the past, say  
13 like the last election that we had back in the  
14 primary, did you count them back then?

15 MR. BENYO: We did not count them.

16 MR. DADAY: So you had a similar  
17 situation?

18 MR. BENYO: The only time we counted  
19 them for the nondated ballots was after the Supreme  
20 Court decision for the November election.

21 MS. ERVIN: Tell me about that. The  
22 November was the Wecht decision, as the attorney  
23 stated.

24 MR. BENYO: Because it stated this  
25 election, that's how we -- how we proceeded with

1 counting them from November 2020, but it was only  
2 for that election.

3 MR. MAZIN: So the read of the Wecht  
4 decision was that this is mandatory, but we're only  
5 going to apply it prospectively, moving forward.

6 MR. BENYO: Moving forward from  
7 November 2020, correct.

8 MR. BONIN: The Wecht decision also  
9 pointed out the need for attention being drawn to  
10 that date line is a critical part of the process.

11 MR. BENYO: As the in parenthesis,  
12 required, next to the date, and the signature.

13 MR. BONIN: I'm going to do something  
14 that as a lawyer I'm not supposed to do, but it's a  
15 fact I want to know so I'll ask this question  
16 anyway. Do you know, did the Board of Elections  
17 with the staff change the outer envelope in any way  
18 from 2020 to 2021 to make it --

19 MR. BENYO: Yes, we added the  
20 requirement in parenthesis behind each of the  
21 required fields.

22 MR. BONIN: Okay. So you're referring  
23 to under the date line in the small print there the  
24 little paragraph where it says, required.

25 MR. BENYO: Correct. If I'm correct,

1 I believe that it was suggested by the Secretary of  
2 State.

3 MR. BONIN: Okay.

4 MR. BENYO: And then approved, our  
5 envelopes were approved by them.

6 MS. ERVIN: So once again we have the  
7 legal scenario based on that Wecht decision, which  
8 as you pointed out, it indicates that going forward  
9 this -- the date would be required. They were just  
10 kind of giving us a break in 2020.

11 MR. BONIN: I do think he says more  
12 than that, and this is really what the argument  
13 rests on, that it's not just -- it's not an  
14 unqualified going forward discount, this is a going  
15 forward we're going to count these because I expect  
16 the forms to be better, I hope -- I expect the  
17 General Assembly to look at this again. I don't  
18 think that they -- you know, his opinion does not  
19 envision a scenario in which we got to November of  
20 2021 and nothing changed. And I don't believe that  
21 adding this, you know, the fine print parenthetical  
22 under the date line gives a sufficient change. But  
23 that's the judgement I'm asking this Board to make.

24 MR. MCCARTHY: Of course, the  
25 Philadelphia ballot, and I'm not saying we need to

1 follow Philadelphia exactly, it has two arrows  
2 pointing to where the dates are being inserted. It  
3 has a bigger print. It says voter sign and mark  
4 here, parenthesis, required, with bolder type than  
5 the Lehigh County one has.

6 MR. BONIN: And the other thing that I  
7 would note is that it was on the back of the  
8 envelope itself and not on the flap which folds over  
9 because often -- you know, which is the case in  
10 Lehigh County, because often you don't look at that  
11 until you're ready to seal the envelope. And so, I  
12 mean, yes, it has -- your ballot must have the  
13 following to be counted, but especially just based  
14 on the evidence of how many voters clearly didn't  
15 see it, I don't know that it provided sufficient  
16 notice.

17 MR. MAZIN: What do you mean by that,  
18 voters that didn't see it?

19 MR. BONIN: Because it's on -- if you  
20 think about it, it's on the outside of the envelope.  
21 So as you're filling out the envelope, you know,  
22 that's facing away from you. And so, you know, you  
23 complete -- you know, you complete, or you believe  
24 you've completed filling out the envelope. You seal  
25 it, you fold it over. And the question is, do

1 people actually see it after they folded the flap  
2 over?

3 MR. MAZIN: But if that's the issue,  
4 wouldn't we at least hear from voters that that was  
5 their thought process during it, or that there was  
6 some type of confusion regarding that, as opposed to  
7 just kind of stating that.

8 MR. BONIN: I honestly think, you  
9 know, and I've been doing election law for awhile, I  
10 think it gets really dangerous to bring up voters  
11 for any reason after an election and asking them  
12 what they thought or what they were thinking at the  
13 time. I don't know how that --

14 MR. MAZIN: I'm just saying, you used  
15 the word evidence. But we don't have testimony  
16 like that.

17 MR. BONIN: We don't have testimony  
18 like that. I think the best evidence of whether  
19 voters understood the instructions is their -- you  
20 know, is the 257 plus three voters not following  
21 the -- you know, not complying with the full  
22 instructions.

23 MR. MCCARTHY: Right.

24 MR. DADAY: May I ask, how many  
25 ballots were returned successfully?



1 MR. BENYO: I think there were  
2 22,000-ish that were successfully counted.

3 MR. DADAY: Okay. And they had all  
4 the information correctly on the form?

5 MR. BENYO: Correct.

6 MR. DADAY: In accordance with the  
7 statute?

8 MR. BENYO: Correct.

9 MR. BONIN: So then this is more than  
10 one in a hundred who missed this requirement.

11 MR. MCCARTHY: Right.

12 MR. DADAY: But it's your opinion  
13 because it does not have all the information that is  
14 mandated by the statute it should not be counted.

15 MR. BENYO: That's why they were not  
16 counted.

17 MR. MCCARTHY: And that's we are here  
18 today. We are here because of the challenge.

19 MS. GLAESSMAN: I don't think we're  
20 going to have any choice.

21 (Discussion among the board off the  
22 record.)

23 MR. MAZIN: I was just going to point  
24 out that there is -- I believe there's guidance from  
25 the State Department Elections Bureau that indicates

1 the interpretation of Justice Wecht's opinion has  
2 been that going forward from the November 2020  
3 election the date is required. And that's the way  
4 the State Department Election Bureau has interpreted  
5 it, and I believe advised the public of what's  
6 required. And given that you have that there was a  
7 change made to signify that it is a requirement on  
8 the ballot itself, where you have the parenthetical  
9 notation, required. So I think the State Department  
10 has interpreted it as mandatory.

11 MS. ERVIN: Well, in the interest of  
12 being consistent, I feel like these voters did  
13 express their intent, got the ballot in on time,  
14 made a technical mistake. And I think their vote  
15 should count.

16 MR. MCCARTHY: Okay.

17 MS. ERVIN: Again, I come down on the  
18 side of people voting. I mean, yeah, they made a  
19 mistake. That happens. But they intended to vote  
20 the way they voted. They filled out almost all the  
21 paperwork correctly. They just missed one thing.  
22 And I think we should give them a break, not  
23 withstanding -- now, if I vote that direction it  
24 could be qualified to say to the election process,  
25 can we beef up the instructions on the next ballot

1 to make it like blinking red lights, sign here, and  
2 date here, or something along those lines.

3 MR. BENYO: The wording can -- I do  
4 not believe I can change the wording, but I can  
5 bring more attention as the example of the other  
6 ballots used, to make sure that it was read.

7 MR. MCCARTHY: Ms. Glaessman, what do  
8 you think about this?

9 MS. GLAESSMAN: Do we go against the  
10 Supreme Court decision and its concurring Justice  
11 Wecht's separate opinion? The ratio of those with  
12 errors is smaller than of course the first time  
13 around, which was last year. And if it's only the  
14 date that is missing -- do you have the system  
15 whereby you can file stamp when the envelope comes  
16 in, that it's in in the proper time?

17 MR. BENYO: There's no question that  
18 these were received. The ones that are too late are  
19 a whole different category.

20 MS. GLAESSMAN: Okay. So there's no  
21 question these were --

22 MR. BENYO: No, they were on time.

23 MS. GLAESSMAN: And the signatures are  
24 proper according to the electronic poll book.

25 MR. MAZIN: I would just note that the

1 provision of the Election Code and that the Court  
2 was interpreting in the case involving Justice  
3 Wecht's concurring opinion is also the term, shall,  
4 with regard to inclusion of the date.

5 MS. GLAESSMAN: Which is what we used  
6 in our earlier provisional ballot decision.

7 MR. MAZIN: Right.

8 MR. MCCARTHY: But Justice Wecht  
9 joined the majority of the Supreme Court in  
10 permitting, at least in that election, ballots that  
11 did not have the date to be counted.

12 MR. MAZIN: Correct. It said -- in my  
13 understanding it said prospectively it's going to be  
14 required. And I think that's consistent with the  
15 Department of State guidance, what their  
16 interpretation had been, that you must have the  
17 date.

18 MS. GLAESSMAN: In future elections  
19 the date requirement should be viewed as mandatory  
20 rather than directory, and the omission of the date  
21 would be sufficient to invalidate the ballot in  
22 question.

23 That's part of his separate opinion.

24 MR. DADAY: I just have one thing I  
25 want to add to that opinion. And it states that for

1       this Court's part if we are to maintain a principled  
2       approach to statutory interpretation that comports  
3       with the mandate of our statutory construction act,  
4       if we are to maximize the likelihood that we  
5       interpret statutes faithfully to the drafter's  
6       intended effect we must read mandatory language as  
7       it appears, and we must recognize that a mandate  
8       without a consequence is no mandate at all. If the  
9       result at the time is that the Court imposes a more  
10      doctrinaire result than the legislature intended,  
11      that body has the tools at its disposal to ensure  
12      that the same state will not be incurred.

13               MR. BONIN: That's absolutely an  
14      accurate statement as to an earlier part of Justice  
15      Wecht's concurrence. There's no question he says  
16      that. But then he goes on to count these ballots.  
17      And then he goes on to provide this additional  
18      language as to what he expects going forward in  
19      terms of what it would look like to have, you know,  
20      a Commonwealth in which these ballots could be  
21      properly excluded because voters were sufficiently  
22      on notice, and because the General Assembly was  
23      absolutely clear that they really wanted this  
24      requirement in the first place. You know, because  
25      the question of what purpose this requirement

1 serves, you know, is a dubious one given that, you  
2 know, given that they were received on time, and  
3 obviously they couldn't have been issued before we  
4 got to this general election.

5 MR. MCCARTHY: I'm reading a portion  
6 of the instructions from Jonathan Marks, the state  
7 election decision. He writes here that -- it's  
8 dated June 1, 2021, quote, we also believe that it  
9 is prudent to again remind you of our previous  
10 clarification on October 25, 2020, period. As noted  
11 in that communication there is no reason to reject  
12 the ballots for putting the wrong date on the  
13 envelope, nor is the date written used to determine  
14 the eligibility of the voter, period. We should  
15 process these ballots normally.

16 MR. BONIN: And actually -- I've seen  
17 that, and I actually believe, and I think this may  
18 be what that is saying, that the Board has decided  
19 to count ballots where voters provided their birth  
20 dates.

21 MR. BENYO: Correct.

22 MR. MCCARTHY: So some voters put down  
23 their birth date.

24 MR. BENYO: The birth date.

25 MR. MCCARTHY: You would count that.

1 MR. BONIN: And in fact you have  
2 counted them in this election.

3 MR. BENYO: We have counted them, yes.

4 MR. COHEN: There's a surprising  
5 number of those where it happened. So it would say  
6 1960, obviously they didn't vote in 1960 for this  
7 election.

8 MS. ERVIN: Crazy.

9 MR. BENYO: It doesn't say what date.  
10 It doesn't require what date.

11 MR. MCCARTHY: It could be a date in  
12 the future.

13 MR. BENYO: But the date is there.

14 MR. MAZIN: There is a date.

15 MR. MCCARTHY: All right. Is there  
16 anyone else who wishes to speak on this matter for  
17 or against?

18 (No response.)

19 MR. MCCARTHY: All right. Hearing  
20 none I guess the Board should deliberate and come to  
21 a decision. So the matter before us is whether to  
22 approve for counting the 257 ballots which have been  
23 brought to our attention by Mr. Benyo, which are in  
24 compliance with the statute with the exception of  
25 the date, not having any date on the ballot.

1                   We've heard from candidates, and their  
2                   representatives. We've heard from others and their  
3                   representatives. We've heard from legal counsel.  
4                   We've looked at the synopsis of the opinion rendered  
5                   by the Pennsylvania Supreme Court, and the guidance  
6                   provided by the State Department of Elections. I  
7                   think the matter before us is a motion, a motion  
8                   could be to approve the ballots, assuming it would  
9                   be accepted to be voted on, or a motion to not  
10                  approve the ballots, assuming it would be accepted  
11                  to be voted on.

12                 MS. ERVIN: Well, I can move that we  
13                 approve the ballots.

14                 MR. MCCARTHY: Is there a second to  
15                 that motion?

16                 MS. GLAESSMAN: I'll second it. Let's  
17                 bring it to a vote.

18                 MR. MCCARTHY: Okay. Any discussion  
19                 on the motion?

20                 MS. ERVIN: My only point here again  
21                 is the intent of the voter, and giving every voter  
22                 who tries to vote the opportunity for the vote to be  
23                 counted, in spite of the fact that they made a  
24                 technical error.

25                 MS. GLAESSMAN: I'll make a statement



1 too.

2 Let me do that for you, Jim. I've  
3 been on Jim's side so I know there can be problems.

4 I agree with Jane with regards to  
5 giving voters to the candidate -- I mean, everything  
6 extra on it. The date, as long as that it could be  
7 proven by the Election Board -- by the Election  
8 Office that it was received on time, the signatures  
9 match the poll book, and considering Justice Wecht's  
10 opinion here, it was and should be the General  
11 Assembly that, you know, takes into consideration  
12 items that have come up since the mail-in ballot law  
13 went into effect, basically in 2020. And I'll agree  
14 to that part of it. But I'll only agree to this  
15 year, and with the proviso so that we look at  
16 revising the envelope to make it much more visible  
17 to the voters. So I'll second that.

18 MR. MCCARTHY: Okay. It's been moved  
19 and seconded to approve the counting of the 257  
20 ballots that have been received. All those in favor  
21 signify by saying aye.

22 MS. ERVIN: Aye.

23 MS. GLAESSMAN: Aye.

24 MR. MCCARTHY: Aye.

25 All opposed.

1 (No response.)

2 MR. MCCARTHY: By a vote of 3 to zero  
3 it's approved.

4 MR. COHEN: Can we get a ruling on the  
5 additional three ballots?

6 MR. MCCARTHY: I thought that was  
7 withdrawn, the three ballots.

8 MR. COHEN: No, that was the earlier  
9 three ballots.

10 MR. BONIN: There were three  
11 provisional that -- these were the three ballots we  
12 previously had said that were dated elsewhere on the  
13 outer envelope on the right side, rather than --

14 MS. ERVIN: These were mail-in  
15 ballots?

16 MR. BONIN: These are mail-in ballots.

17 MR. MCCARTHY: So they had a date on  
18 it?

19 MR. BONIN: But not in the right  
20 place.

21 MS. ERVIN: I think we should accept  
22 those ballots too.

23 MS. GLAESSMAN: I'll agree.

24 MR. MCCARTHY: All in favor?

25 MS. ERVIN: Aye.

1 MS. GLAESSMAN: Aye.

2 MR. MCCARTHY: Aye.

3 Those three ballots are approved as  
4 well. If they can put the wrong date on it --

5 MS. GLAESSMAN: The date is there,  
6 it's just in the wrong box.

7 MR. MCCARTHY: Anything else to come  
8 before us?

9 MR. BENYO: I do. The Commonwealth,  
10 the Judge of the Commonwealth Court, the close race  
11 that has the final tally being less than half a  
12 percentage point, which triggers an automatic  
13 recount, to meet the timelines of the Department of  
14 State, which would be commencing a recount on  
15 Wednesday, we need to certify the results of just  
16 that office today. So that there's a two day appeal  
17 period. But they don't have to be final  
18 certification, they won't be final certification  
19 because there's a recount. But we have to be  
20 complete.

21 So if you could make a motion to first  
22 certification of the Commonwealth Court judge race  
23 to include the -- you made the decision on the 260  
24 ballots, the result to include the 260 ballots, plus  
25 I have four that need to be counted from military

1       and provisional that should be counted that were  
2       correct. So there's four outstanding ballots that  
3       are good, and the 260 that you approved today. And  
4       then that would be the first certification for the  
5       Commonwealth Court. Does that make sense?

6               MR. MCCARTHY: I think it does.

7               It's very simple.

8               MS. GLAESSMAN: I'll make the motion  
9       according to what Tim said.

10              MS. ERVIN: I'll second it. I just  
11       want to clarify. We're including all the ballots we  
12       discussed today in the count for the Commonwealth  
13       judge recount?

14              MR. BENYO: That's correct.

15              MR. MCCARTHY: And the military  
16       ballots.

17              MR. BENYO: And then the same timeline  
18       would be in effect as we discussed as the 17th  
19       being the first certification, and everything else  
20       post casting of lots at high noon.

21              MS. GLAESSMAN: The final  
22       certification will be next Monday.

23              MR. BENYO: Yes. And then the whole  
24       recount hopefully will fall -- it may fall into that  
25       same timeline, but I think it will be extended a

1           little later because of the recount.

2                       MS. GLAESSMAN: Just for the  
3           Commonwealth Court.

4                       MR. BENYO: Just for the Commonwealth  
5           Court.

6                       MS. ERVIN: But everything else is on  
7           schedule.

8                       MR. BENYO: Everything else, yeah, we  
9           are on schedule to be finished with the write-ins  
10          on -- for Wednesday's casting lots at high noon.  
11          And then five days later will be Monday, the 22nd  
12          will be the final certification on everything,  
13          including today's discussion.

14                      MS. ERVIN: Okay.

15                      MR. MCCARTHY: So we are back here on  
16          Monday, 2 p.m.

17                      MR. BENYO: Monday 2 p.m. upstairs. I  
18          think I have the public hearing room. But that will  
19          be announced in the paper and on the website.

20                      MR. DADAY: Mr. Chairman.

21                      MR. MCCARTHY: Yes.

22                      MR. DADAY: With regard to the 260  
23          ballots we would ask that they be kept separate from  
24          the rest of the vote tally so that we can properly  
25          deal with those issues on appeal.

1 MR. MCCARTHY: Sounds fair.

2 MR. BENYO: I don't know if we can  
3 keep them separate from the total, but they can be  
4 challenged afterwards. I mean, I will not include  
5 them into boxes of all the other ballots. We can  
6 then remove them. I have to provide the ability to  
7 remove those ballots after any --

8 MR. DADAY: Okay.

9 MR. BONIN: So you'll open them, count  
10 them, and the results will be known, but the results  
11 can be subsequently excluded.

12 MR. BENYO: Absolutely.

13 MR. BONIN: Okay.

14 MR. MCCARTHY: And you'll keep the  
15 physical ballots separated.

16 MR. BENYO: Separated, absolutely.

17 MR. WHITE: If I may ask a question, I  
18 was here during the pre-canvass and canvass period.  
19 Will they be scanned on a separate machine from the  
20 other high speed scanners that the rest of the  
21 absentee ballots and mail-in ballots are scanned on  
22 for segregation purposes?

23 MR. BENYO: Well, they're not included  
24 in that. So once everything goes through there then  
25 those ballots are kept in batches in a separate box.

1       They will be kept separate.

2               MR. WHITE:   So when that data is taken  
3       off of the scanner and uploaded to the computer will  
4       that be segregated electronically?

5               MR. BENYO:   Well, it can be backed out  
6       if necessary.

7               MR. WHITE:   That's what I'm asking, to  
8       make sure that it is capable of physical and  
9       electronic segregation so that in the event they get  
10      added to the tabulated totals for the Court of  
11      Common Pleas race, that there is a way if the  
12      appellate court changes the result.

13              MR. BENYO:   I understand.

14              MR. WHITE:   I just want to make sure  
15      that it's really clear before I leave the room,  
16      because I was here the whole time when these were  
17      processed. And then if I may be permitted to take a  
18      look at the four that you're adding after the  
19      decided ones, because I don't think I've seen those.

20              MR. BENYO:   No, you haven't.

21              MR. WHITE:   Thank you. So I was here  
22      for all plus those four.

23              MR. BENYO:   I don't want you to miss  
24      any.

25              MS. ERVIN:   Too exciting.

1                   MR. MCCARTHY: Anything else to come  
2 before the Board?

3                   MR. BENYO: I believe that is it.

4                   MR. MCCARTHY: All right. If nothing  
5 else to come before the Board, we are adjourned.

6                   (Hearing concluded.)  
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\_\_\_\_\_, 2021

I hereby certify that the evidence and  
proceedings are contained fully and accurately in  
the notes taken by me of the within Board of  
Election hearing, and that this is a correct  
transcript of the same.

\_\_\_\_\_  
James P. Gallagher III  
Registered Diplomate Reporter  
Notary Public

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